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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES D. ASKEW, M.D., GINGER BUCK, PHILLIP MAHAN, and the CITY OF NORTHPORT, ALABAMA,

Petitioners,

v.

DCH HEALTH CARE AUTHORITY and WEST ALABAMA GENERAL HOSPITAL, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a quasi-governmental entity, which is not a municipality and which has no political accountability or other such indicia of a governmental body (such as subjection to state sunshine and ethics laws, and elected officials), is entitled to state action immunity from the federal antitrust laws without demonstrating active state supervision merely because the authorizing statute declares it to be a "political subdivision."

LIST OF PARTIES

Petitioners James D. Askew, M.D., Ginger Buck, Phillip Mahan and the City of Northport, Alabama, were the plaintiffs-appellees in the proceedings below. Respondents DCH Health Care Authority and West Alabama General Hospital, Inc. were the defendants-appellants in the proceedings below.[1]

[1] There are no parent or subsidiary companies to be listed.

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PETITION FOR WRIT OF CERTIORARI

Petitioners James D. Askew, M.D., Ginger Buck, Phillip Mahan, and the City of Northport, Alabama, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on July 19, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has been reported at 995 F.2d 1033 (11th Cir. 1993), and is reprinted in the Appendix hereto at pages 1-18.

The order of the United States District Court for the Northern District of Alabama is unreported, and is reprinted in the Appendix hereto at pages 19-20.

JURISDICTION

Petitioners brought this suit in the United States District Court for the Northern District of Alabama, invoking jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1337. On September 30, 1992, the District Court denied Respondents' motion to dismiss, as well as their alternative motion for summary judgment, without written opinion.

Respondents appealed to the United States Court of Appeals for the Eleventh Circuit, invoking jurisdiction under 28 U.S.C. § 1291. The Eleventh Circuit reversed the decision of the District Court on July 19, 1993 and remanded the case to the District Court for proceedings consistent with its opinion.

Petitioners invoke the jurisdiction of this Court to review the Judgment and Order of the Eleventh Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Health Care Authorities Act of 1982 (Ala. Code § 22-21-310, *et seq.*, as amended in 1987 (Ala. Code § 22-21-350, *et seq.*) and 1990 (Ala. Code § 22-21-357, *et seq.*), is reprinted in the Appendix hereto at pages 21-81.

Sections 1 and 2 of the Sherman Antitrust Act of 1890 (15 U.S.C.A. §§ 1 and 2) are reprinted in the Appendix hereto at page 82.

STATEMENT OF THE CASE

In 1982, DCH Health Care Authority ("DCH") was reincorporated pursuant to resolutions passed by various authorizing subdivisions, including petitioner City of Northport, Alabama. Such resolutions were passed under the auspices of the Health Care Authorities Act of 1982. (Ala. Code § 22-21-310, *et seq.*) This Act was amended in 1987 (Ala. Code § 22-21-350, *et seq.*) and in 1990 (Ala. Code § 22-21-357, *et seq.*).

Under the Health Care Authorities Act, DCH holds no public elections and is exempt from public bidding requirements, the state ethics laws, the open meetings act, and public disclosure of most of its financial records. (Ala. Code §§ 22-21-335, 22-21-334, and 22-21-316). Although DCH's authorizing subdivisions, such as petitioner City of Northport, appoint a majority of the Board of DCH, they must select those appointments from a list of names submitted by DCH. (Ala. Code § 22-21-352). DCH has no obligation to submit additional names if the authorizing subdivisions do not wish to make appointments from the original list; rather, DCH can insist that the authorizing subdivisions appoint one of its initial nominees.

In May, 1992, DCH acquired the stock of a subsidiary of American Medical International, Inc. ("AMI"). AMI, a private hospital and DCH's only significant competitor, had previously transferred all of its assets to this subsidiary corporation; the acquisition, therefore, effectuated a buyout of AMI. DCH undertook this acquisition secretly, requiring its Board members to sign a confidentiality agreement that prevented any disclosure of the acquisition, and otherwise acting to prevent public awareness until the acquisition had been completed.

Shortly after the acquisition became public, the City Council for the City of Northport, Alabama, one of the original authorizing subdivisions of DCH under the statute, passed a resolution opposing the acquisition.

On June 10, 1992, petitioners Askew, Buck and Mahan filed their complaint in the Northern District of Alabama seeking to enjoin DCH and AMI from finalizing the buyout as violative of Sections 1 and 2 of the Sherman Act. Along with their complaint, petitioners filed a motion for a temporary restraining order and preliminary injunction and a memorandum in support of that motion.

In conjunction with their motion for a temporary restraining order and a preliminary injunction, petitioners filed the affidavit of Dr. John Pisarkiewicz, an economic expert with extensive experience in the health care field. Dr. Pisarkiewicz's affidavit testimony established that DCH's acquisition of AMI, coupled with its effective control of another hospital in the area through a long term agreement, gave DCH market shares in the relevant market ranging from 88 to 93% in various measures of market power. Based on these facts, Dr. Pisarkiewicz testified that DCH would (as it subsequently did) gain monopoly power in the relevant market by acquiring AMI.

On June 10, 1992, the district court, Judge Clemon presiding, heard oral argument on the motion for a temporary restraining order and denied the motion without written opinion, citing petitioners' inability to show danger of irreparable injury or a substantial likelihood of success on the immunity issue. The district court set an expedited hearing on the motion for preliminary injunction.

The day after the court denied the temporary restraining order, the respondents filed a Motion to Dismiss, or in the Alternative for Summary Judgment based upon

state action immunity. Petitioners timely filed a response and a motion to amend the complaint to add some facts outlined for the court during oral argument, and to add the City of Northport, Alabama as a plaintiff. The district court granted petitioners' motion to amend. Petitioners also filed a Rule 56 affidavit, outlining petitioners' counsel's belief in his ability to prove facts regarding an absence of immunity given even limited discovery.

On September 30, 1992, Judge Clemon denied respondents' Motion to Dismiss without written opinion. Respondents immediately sought review of Judge Clemon's holding by way of expedited appellate review under the collateral order doctrine.

On July 19, 1993, the United States Court of Appeals for the Eleventh Circuit reversed the decision of the District Court and remanded the case for proceedings consistent with its opinion. In so deciding, the Court relied on its previous decision in *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991). *See* p. App. 11. In *Todorov*, the Eleventh Circuit concluded without discussion that under *Town of Hallie*, "[w]hen the defendant is local governmental entity . . . there is no requirement that the defendant be actively supervised by the state in order to enjoy" state action immunity. *Todorov*, 921 F.2d at 1460, n. 36. Based on this reading of *Town of Hallie*, the *Todorov* court held that because the Alabama legislature had "made any hospital organized pursuant to the Act a local governmental agency" by labeling it a "political subdivision of the state," DCH need only show a clearly articulated and affirmatively expressed state policy to achieve immunity. *Id.* at 1461.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Effectuates An Unwarranted Expansion Of State Action Immunity By Conferring Such Immunity, In The Absence Of Active State Supervision, On Quasi-Governmental Entities Without Political Accountability.

The Eleventh Circuit's decision in the instant case impermissibly broadens the state action immunity doctrine by wholly ignoring the public policy considerations underlying the private actor/municipal actor dichotomy under that doctrine. Relying solely upon the authorizing statute's pronouncement that health care authorities constitute political subdivisions, the court held that DCH should be treated as a municipality for the purpose of determining the applicability of state action immunity. This decision not only contravenes language in long-standing decisions of this Court forbidding the conferral of immunity by fiat, it threatens to destroy the balance between federalism and federal antitrust law by permitting states to abdicate their supervisory responsibility over quasi-governmental actors by merely labeling such entities "political subdivisions."[2] Moreover, the decision legitimizes the anti-competitive conduct of these quasi-governmental bodies although they operate without the responsibility and accountability ensured by a system of checks and balances, thereby creating enormous potential for financial and political abuse of the public trust.

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[2] The statute at issue in this case is not rare. Increasingly, state legislatures, faced with strict budgetary constraints, are conferring broad unchecked powers on quasi-governmental entities in industries such as health care, telecommunications and insurance.

In a series of decisions commencing with *Parker v. Brown*, 317 U.S. 341 (1943), this Court has recognized the doctrine of state action antitrust immunity, which operates to shield state activity from antitrust scrutiny. Because state action immunity is premised on principles of federalism, this Court has conferred immunity solely and uniquely on the state sovereign. Although the state sovereign may authorize other entities to act on its behalf, it may not, by fiat, imbue those other entities with its immunity. *Id.* at 351 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ."). *See also Federal Trade Commission v. Ticor Title Insurance Co.*, 112 S. Ct. 2169, 2176 (1992) ("a state may not confer antitrust immunity on private persons by fiat. . . ."). Rather, entities purporting to act on behalf of the state and therefore with the protective cloak of immunity must demonstrate that their actions are truly those of the state.

The rigor of the test applied to determine whether a challenged action can truly be considered that of the state depends upon the identity of the actor. A private party must establish a clearly articulated and affirmatively expressed state policy authorizing the conduct, **and** active supervision of the conduct by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). A municipality, however, need demonstrate only the former element—a clearly articulated and affirmatively expressed state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The lighter burden assigned to municipalities arises out of a rebuttable presumption that the structure of municipal governments ensures that they act in the public interest when carrying out state mandates. *Id.* at 45, n.9. Private parties, in contrast, "may be presumed to be acting primarily on [their] own behalf,"

necessitating application of the second prong of the immunity test. *Id.* at 45. This stricter standard is meant to prevent states from insulating unqualified conduct from federal antitrust scrutiny "by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985), quoting *Midcal*, 445 U.S. at 106.

In the instant case, the court below implicitly held that quasi-governmental agencies such as DCH automatically warrant application of the abbreviated immunity test.[3] In so holding, the Eleventh Circuit, without discussion or explanation, expanded the *Town of Hallie* decision to include all so-called political subdivisions. This Court, however, has never held that a political subdivision other than a municipality is exempt from the two-pronged test.[4] Moreover, nothing in the language of *Town of Hallie* legitimizes such blind deference to a legislature's characterization of an entity as a "political subdivision" for the purpose of determining immunity.

Significantly, in relieving municipalities from the active state supervision prong of the immunity test, the *Town of Hallie* Court used as the linchpin of its decision the public attributes of a municipality. The Court noted that,

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[3] As the Eleventh Circuit stated, "Despite the language in footnote 9 [in *Town of Hallie*], neither *Town of Hallie* nor any other Supreme Court or Eleventh Circuit case has held that a political subdivision that is not a municipality—i.e. a water authority, a transit authority, a public hospital corporation—is subject to the two-prong test of *Midcal*." *See* p. App. 10.

[4] The cases from other circuits cited by the Eleventh Circuit in support of its position, *see* p. App. 11, n. 10, are distinguishable. Those cases, some of which are discussed below, involved entities whose directors were appointed by elected state officials.

unlike private parties, municipalities tend to act under public scrutiny, subject to mandatory disclosure regulations and electoral review, thereby avoiding the "real danger" presented by private parties—that they would act "to further [their] own interests, rather than the governmental interests of the state." *Town of Hallie*, 471 U.S. at 47. So fundamental did this Court consider public oversight of municipalities to its decision to exempt them from the second prong of the immunity test that it expressly recognized that even a municipality could be shown to act contrary to the public interest. *Id.* at 45 (stating "[w]e may presume, **absent a showing to the contrary**, that the municipality acts in the public interest") (emphasis added). Although the Court did not discuss the significance of such a showing with regard to the application of the immunity test, this dicta mitigates against a rigid private actor/municipal actor dichotomy and blind acceptance of legislative labels.

Rather than reading *Town of Hallie* as a limited exception to the two-prong state action immunity decision, however, the court below used it as a justification for extending the permissive one-prong standard to hybrid entities—those entities such as DCH that are created pursuant to state statute and designated "political subdivisions" but which possess few (if any) of the political checks inherent to municipalities. The court did so *despite* its admission that DCH "is not subject to those safeguards that ensure that a municipality is acting in the public interest." *See* p. App. 10. The proffered justification for its decision—merely that the Supreme Court has not held that a political subdivision other than a municipality is subject to the two-prong test of *Midcal*—highlights just how far afield some appellate courts have gone in conferring immunity

and illuminates the need for direction from this Court regarding the availability of the abbreviated test for hybrid entities such as DCH.

II.

The Eleventh Circuit's Decision Contravenes Decisions By Other Circuits That Mandate Analysis Of An Entity's Functional Characteristics Before Exempting It From The Second Prong Of The State Action Immunity Test.

The court below not only misinterprets the dictates of *Town of Hallie*, it presents an analysis that conflicts with that undertaken by other circuits that have considered the issue of state action immunity. While the Eleventh Circuit blindly accepted the legislature's label of DCH as a "political subdivision" and, using that label, forced DCH into the existing private actor/municipal actor dichotomy, other circuits have adopted a more functional analysis involving independent judicial assessment of the challenged entity's public and private characteristics.

The Ninth Circuit has repeatedly analyzed the characteristics of entities engaged in anticompetitive behavior pursuant to a clear state mandate to determine if those entities must be actively supervised by the state. In *Washington State Electrical Contractors Ass'n, Inc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 439 (1992), the Ninth Circuit considered a second appeal regarding the antitrust immunity of the Washington State Apprenticeship and Training Council ("the Council"), an organization established pursuant to the State of Washington's Apprenticeship Act ("the Act") to issue rules and regulations establishing standards for apprenticeship agreements. *Id.* The Supreme Court had granted certiorari and vacated an earlier judgment of the Ninth Circuit, remand-

ing the case for further consideration in light of *Patrick v. Burget*, 486 U.S. 94 (1988).[5]

On remand, the trial judge determined that the Council was a state agency and found it unnecessary to reach the question of state supervision. However, the Ninth Circuit, focusing on the private attributes of the Council, did not agree:

> It is now apparent, after further briefing and argument, that the Apprenticeship Council may not qualify as a state agency. The council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy.

Washington State, 930 F.2d at 737. The Ninth Circuit then remanded the case to the district court for specific findings and conclusions on both prongs of the immunity test.

The Ninth Circuit also engaged in this functional approach in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). There, the court closely considered the attributes of the Oregon State Bar ("the Bar") before designating it "an agency of the State of Oregon." *Id.* at 1460. In particular, the court emphasized that the records of the Bar are open for public inspection; the Bar's accounts and financial affairs are subject to periodic audits by the State Auditor; and the members of the Bar's Board of Governors are public officials who must comply with the state code of ethics. *Id.* The court concluded that "[w]hen the actor is a state agency **subject to requirements such as those set forth above**,

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[5] It is not clear from this Court's opinion whether it considered the Council to be a public actor, private actor, or combination of the two. If this Court considered the Council to be anything other than a purely private actor, then this Court's decision in *Washington State* would appear to favor petitioners' position.

just as when the actor is a municipality, 'there is little or no danger that it is involved in a *private* . . . arrangement.' " *Id.*, quoting *Town of Hallie*, 471 U.S. at 47. Thus, unlike the Eleventh Circuit, the Ninth Circuit will not include hybrid entities, even state agencies, within the rubric of *Town of Hallie* unless the entities possess the attributes of a municipality which will ensure accountability to the public. *Cf. Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 400 n.5 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168 (1992) (contemplating application of the active supervision prong to the Antelope Valley Hospital District, a not-for-profit hospital district organized under California's Local Hospital District Law, Cal. Health & Safety Code, § 32000).

The First Circuit also considers the attributes of an entity before exempting it from the second prong of the immunity test. In *Federal Trade Commission v. Monahan*, 832 F.2d 688 (1st Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), the FTC notified the Massachusetts Board of Registration in Pharmacy ("the Board") of its intent to investigate three of the Board's rules for unreasonable restraint of competition. *Id.* The Board objected to the inquiry, citing its immunity from federal antitrust laws as a state regulatory agency. *Id.* at 689. The court rejected the Board's contention, holding that "[w]hether any 'anticompetitive' Board activities are 'essentially' those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists." *Id.* at 690.[6]

[6] Admittedly, *Monahan* was a subpoena enforcement case such that the First Circuit did not have a complaint outlining the actions of the Board alleged to be anticompetitive. However, the rationale was sound and reflected the court's hesitancy to apply the *Town of Hallie* holding to a hybrid entity without further investigation.

The Sixth Circuit has similarly demonstrated a reluctance to accept superficial labeling and attributes as dispositive on the issue of which immunity test to apply. In *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990), Riverview Investment ("Riverview") brought suit challenging the Ottawa Community Improvement Corporation's ("CIC") denial of Riverview's request for bond approval under, *inter alia*, the federal antitrust laws.[7] CIC claimed immunity from the antitrust laws because of its status as a public entity. The district court, however, found that "CIC was not considered by the State as a municipality, or agency of a municipality," but rather was "a private, non-municipal party." *Id.* at 479.

On appeal, the Sixth Circuit began its analysis by discussing its own opinion in *Consolidated TV Cable Services, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989). There, the Electric and Water Plant Board of the City of Frankfort, Kentucky had created Community Services, Inc., a non-profit, non-stock corporation, to operate a cable TV network owned by the City. Consolidated TV, a private cable company, brought suit based on the denial of its request to extend its cable service into areas served by Community Services. After examining the facts and concluding that the Board had ultimate control of Community Services, the Sixth Circuit found that Community Services was a municipal agent to be treated as such for purposes of the doctrine of state action. *Id.* at 358-59.

[7] CIC is a non-profit corporation contractually responsible for reviewing requests for industrial revenue bonds on behalf of the Village of Ottawa.

Applying the same analysis in *Riverview*, the Sixth Circuit found the municipal control that warranted the treatment of Community Services as a municipality in *Consolidated TV* to be utterly absent from CIC. *Riverview*, 899 F.2d at 479-480. Specifically, the court noted that "although the Village had plenary control over CIC to the extent that it could terminate its existence by passing an ordinance, the Village had no right to appoint CIC members as the Board did in *Consolidated TV*," and "CIC made all appointments without involvement of the Village." *Id.* at 480.[8] Accordingly, the court found that the abstract theoretical power to terminate CIC's existence through the passage of an ordinance was not a sufficient indication that CIC was controlled by the Village. *Id.* Thus, the indicia of control needed to demonstrate that CIC was a municipal agent entitled to state immunity under *Town of Hallie* were absent, and the court treated CIC as a private party.[9]

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[8] Based on these facts, the Sixth Circuit found inapposite the decisions in *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988) (state immunity found without determination of whether the defendant agency was a public or a private entity), and *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032 (2d Cir. 1986) (New York's Urban Development Corporation given state action immunity). For example, two of nine members of the Urban Development Corporation were public officials, and the remainder were designated by the governor and approved by the state senate. CIC, in contrast, appointed its own members with no input from the state or local government. *Riverview*, 899 F.2d at 481.

[9] Significantly, responding to an argument submitted by the Ohio Attorney General, as amicus, the Sixth Circuit stated:

> Because *Hallie*'s grant of immunity is predicated on the fact that the actor's alleged anticompetitive conduct is done pursuant to state policy, the Attorney General argues that the public/private distinction is less a matter of rigid, nominal **classification** than it is a matter of identifying the actor's

(Footnote continued on following page)

Finally, the Seventh Circuit has also espoused a state action immunity inquiry that examines the attributes of the entity engaging in anticompetitive activity. In *Fuchs v. Rural Electric Convenience Cooperative, Inc.*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), the court struggled to properly characterize defendant RECC, an unregulated, not-for-profit Illinois corporation owned by nearly 5,000 consumer-members and governed by an elected board of directors. The court refused to arbitrarily label RECC as a "private party" for state action immunity purposes and, instead, focused on RECC's attributes to determine whether it was the state, a state agency, or an "arm of the state" or whether, like a private party, it might seek to further its own interests at the expense of state goals. The court concluded that "[a]lthough RECC has the power of eminent domain, it is not a body politic like a municipal corporation and is not subject to public scrutiny through sunshine laws or the political process." *Id.* at 1217. Only after conducting this inquiry did the court conclude that RECC was a hybrid entity subject to some lower level of supervision than the *Midcal* two-prong test to ensure that it acted pursuant to state policy. *Id.*

It is apparent, therefore, that the Circuit Courts of Appeal are neither certain nor in agreement when applying

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[9] *continued*

function. If the entity is found to be behaving as a public entity pursuing public interests, it should be afforded immunity; if it is pursuing predominantly private interests, it should not be.

Riverview, 899 F.2d at 481. Although the Sixth Circuit found it unnecessary to "rule on the wisdom of the test, since the District Court's conclusions are supported even if analyzed under the Attorney General's framework," it is noteworthy that they devoted almost two pages of the opinion to the suggestion. *Id.*

the abbreviated test announced in *Town of Hallie*. While some circuits have engaged in factual inquiries to determine if entities other than municipalities warrant the protection of state action immunity in the absence of active state supervision, others, such as the Eleventh Circuit, have accepted legislative labels. The disparate interpretation by the circuit courts evidences the need for this Court to further enunciate the principles and parameters of *Town of Hallie*.

CONCLUSION

The Eleventh Circuit's decision eviscerates the public policy reasons articulated in *Town of Hallie* for conferral of state action immunity without active state supervision. By accepting the legislative designation of an entity as a "political subdivision" without inquiry into its public/private attributes, the Eleventh Circuit has impermissibly sanctioned the conferral of immunity by fiat. In so doing, it conflicts with the approach suggested by this Court and adopted by other circuits. Petitioners therefore respectfully request that their petition for certiorari be granted.

Respectfully submitted,

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